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Issue Date: 10 October 2002

Case No.: 2002-CAA-00010

In the Matter of

DR. GLENN ERICK PETERS, Ph.D.
Complainant

v.

TENNESSEE VALLEY AUTHORITY
Respondent

RECOMMENDED DECISION AND ORDER

Background

This case arises under the employee protection provisions of Section 312 of the Clean Air Act 42 U.S.C. 7622 (Act). Complainant appealed a ruling dated February 4, 2002, from the Occupational Safety and Health Administration (OSHA) that his initial complaint was untimely filed. The matter proceeded to formal hearing on June 18, 2002.

Prior to the hearing, Respondent sought summary dismissal of Complainant's complaint upon the grounds that Complainant had filed no timely written complaint. Respondent's motion was denied on March 26, 2002.

At the formal hearing on June 18, 2002, the issue of timeliness was again raised. Because of the importance of the issue and because both sides produced evidence on the subject for the first time at the hearing, at the conclusion of the trial the parties were granted until July 17, 2001, to develop additional evidence on the issue of timeliness and file written briefs in support of their respective positions. Both parties complied, and by Decision and Order dated July 23, 2002, Complainant's complaint was found to be timely filed. The parties were then granted additional time to file briefs regarding the merits of the complaint. The findings and conclusions in this Decision are based

upon observations of the witnesses who testified, upon an analysis of the entire record, arguments of the parties, applicable regulations, statutes and case law precedent.¹

Exhibits and Stipulations

The exhibits in this case consist of Administrative Exhibits, Complainant's Exhibit and Respondent's Exhibits. At the outset, the parties stipulated that (1) Respondent is subject to the Act, and (2) Complainant was an employee protected under the Act, but Respondent denies Complainant engaged in protected activity.

Issues

The issues in this case are as follows:

1. Whether Complainant engaged in protected behavior under the Act;
2. Whether Respondent knew of Complainant's alleged protected activity under the Act;
3. Whether Respondent discharged Complainant because of his alleged protected activity; and
4. What damages, if any, is Complainant entitled to if he is successful in proving his claim?

Findings of Facts

1. Complainant was employed as an Analytical Chemist, CS-B, in Respondent's River System Operations and Environment, Energy Research and Technology Applications (ER&TA), Environmental Engineering Services, West organization, in Muscle Shoals, Alabama, in May 2001;

¹ The conclusions that follow are in part those proposed by the parties in their post-hearing proposed findings of fact, conclusion of law and order, for where I agreed with summations I adopted the statements rather than rephrasing the sentences.

2. Complainant's appointment was to a temporary full-time annual position not to extend beyond six months and one day, beginning May 16, 2001, at an annual salary of \$58,000.00, and ending on November 21, 2000. (TVA Ex. 1). His supervisor was Dr. Anthony Zarate and Dr. Zarate's supervisor was Randy Weatherington.

3. Complainant first sought employment with Respondent more than a year earlier when he called Ron Williams, Vice President of ER&TA.

4. Complainant represented to Dr. Williams and other managers in ER&TA that he had business contacts in Saudi Arabia where he had previously worked which possibly could be developed into business opportunities for TVA.

5. As evidenced by exhibit CX 2, Respondent lost interest in Saudi Arabia, but Complainant was eventually hired by Dr. Williams and Mr. Weatherington, Manager, Environmental Engineering Services, West, to assist Dr. Zarate in preparation of documentation for off-site TVA work projects in Newport, Indiana, and Pine Bluff, Arkansas.

6. Respondent had a contract with the United States Department of Defense to perform demolition work at the United States Army Newport Chemical Depot, which was shut down in 1968. This facility had been used for the production of VX, a toxic chemical warfare agent. (TVA EX 21). Respondent began demolition work in 1999, working to dismantle piping and equipment in Steps 0, 1, and 2 of the facility which were precursors to the actual VX production.

7. Respondent had established a mobile chemistry laboratory (MCL) at the Newport, Indiana site to be available to analyze samples of materials found at the demolition worksite to ensure worker safety. Chemists and laboratory technicians were assigned from the Environmental Engineering Services group to operate the MCL to support the work of trades and labor employees who were performing the actual demolition work.

8. Complainant was assigned to work under the supervision of Dr. Zarate, who had responsibility for management of the Newport MCL. Dr. Zarate initially assigned Complainant the task of reading the manuals and becoming familiar with the operation of the MCL at the Newport Depot.

9. After Complainant completed his reading assignment regarding the Newport Laboratory, Mr. Weatherington instructed Dr. Zarate to send Complainant to Newport to perform work as an Analytical Chemist.

10. Complainant reported to Newport initially on July 23, 2001. He was assigned to work under the supervision of Amanda Gordon, MCL Supervisor. After completing the onsite orientation and safety training provided to all employees who reported to the Newport Depot, he was to be trained in laboratory procedures in the MCL by Louis Stumpe, a Chemist in the Engineering Services group.

11. Ms. Gordon testified that Complainant, who holds a Ph.D. in Chemistry, had trouble with simply laboratory procedures like removing bubbles from the laboratory tubes with syringes and with operating the computer keyboards attached to the laboratory instruments.

12. According to Ms. Gordon, at this time Complainant did not discuss with her any concerns he had regarding safety glasses, gloves, or laboratory coats. Neither did he mention any concerns about the unavailability of written standard operating procedures (SOP) in the laboratory.

13. On Friday, August 3, at the end of Complainant's second week at Newport, Ms. Gordon reported by phone to Dr. Zarate, her concerns about Complainant's performance deficiencies in the laboratory.

14. Complainant came to Dr. Zarate's office on Monday, August 6, after his return from Newport, to discuss what he had learned and/or done in Newport for two weeks. Dr. Zarate began to discuss the performance issues noted by Ms. Gordon, and Complainant began to tell Dr. Zarate of concerns he had observed in the Mobile laboratory regarding lack of use of safety glasses, laboratory coats, safety gloves, and the lack of availability of written SOPs for the direct analysis method for VX.

15. As the meeting continued, both Complainant and Dr. Zarate raised their voices and the discussion became heated. Dr. Zarate admittedly cursed and attempted to end the conversation by asking Complainant to leave his office. Complainant refused. Linda Faires, Dr. Zarate's secretary, heard Dr. Zarate say "Who's the supervisor and who's the employee?"

16. Ms. Gobble, whose office was four doors down the hall from Dr. Zarate's, heard Complainant's voice speaking in a loud and agitated manner, and walked out of her office into the hall. She saw Complainant standing in Dr. Zarate's doorway, waving his arms and heard him continuing to speak in a loud voice. She did not hear Dr. Zarate. She called Mr. Weatherington to come from his office upstairs to handle the situation and testified that had he not been available, she would have called the TVA Police.

17. Mr. Weatherington asked the two men to come into the office, and be seated. He then asked Dr. Zarate to tell him what had happened. Complainant interrupted stating that Dr. Zarate had cursed him. Each time Dr. Zarate attempted an explanation, Complainant would interrupt. Finally, Mr. Weatherington asked Complainant to return to his own office and wait there.

18. After Dr. Zarate described what had happened in his office, Mr. Weatherington counseled him that as the supervisor, he should not have used profanities in talking with Complainant and that he should give Complainant his work assignments in writing. Dr. Zarate then apologized to Complainant for his use of profanities and prepared a specific description of Complainant's work assignments which he sent by e-mail to Complainant on August 7 (CX 9). The work assignments included reviewing and filling in the details of two existing SOPs for VX analysis in the laboratory in preparation for sending them to the Army for approval and preparing, in detail, an outline for training employees assigned to work in the laboratory. Complainant was given two weeks to complete the SOP assignment and three weeks to complete the training outline assignment.

19. Dr. Zarate also called Ms. Gordon to discuss the absence of laboratory coats, safety glasses, and safety gloves in the MCL and to ensure that they were being used. Ms. Gordon testified she remedied the situation immediately.

20. On August 8, Complainant came to Dr. Zarate saying he did not understand the SOP writing assignment, and Dr. Zarate went over in detail what he wanted. Complainant then turned in a document on August 10. When Dr. Zarate reviewed it on August 15, he found that Complainant had not done as he was directed but had combined the two existing SOPs and had failed to include many of the required details.

21. Complainant returned to Newport, Indiana, on August 13, reporting for a his second four-week rotation. He was to complete his training in use of the laboratory and complete his work assignment regarding the training outline.

22. Dr. Zarate spoke with Ms. Gordon by phone on a regular basis in their roles as manager and supervisor respectively of the Mobile Laboratory. At times they had heated discussions regarding the laboratory and Ms. Gordon's living arrangements in Indiana. Complainant testified that after one of those conversations, Ms. Gordon reported that Dr. Zarate was concerned that Complainant was after his job. Both Dr. Zarate and Ms. Gordon deny that such remarks were made.

23. Dr. Zarate visited the Newport site on August 22, 2001. Before a morning staff meeting, Dr. Zarate inquired of those present what they thought of Complainant's work and expressed his concern and displeasure in negative terms with how Complainant was performing his assignments. Complainant testified that Steve Cox, a supervisor at Newport, reported those remarks to him. According to Complainant's testimony, Mr. Cox told him he never heard anyone speak about a subordinate in such negative terms as Dr. Zarate spoke about Complainant.

24. During this visit to Newport, Dr. Zarate again discussed the SOPs and the training assignment with Complainant and with Ms. Gordon. Complainant later discussed this assignment with Ms. Gordon because he had failed to take notes. Ms. Gordon gave Complainant input as to how to proceed with completing the assignment, but when he eventually turned in the assignment to Dr. Zarate, it was unsatisfactory.

26. One of the tasks in the MCL at the beginning of each work day was to make sure the gas chromatograph (GC) was working properly. The GC is used to test the content of the DAAMS tubes which are placed at the worksites where the dismantling of the piping is actually occurring. If an alarm on the MINICAMS at the worksite is sounded indicating the presence of a suspicious substance in the work areas, a two-hour process is set in place. During the two hours, a sample is collected at the worksite in the DAAMS tubes and brought to the MCL for testing in the GC.

27. As the laboratory supervisor, Ms. Gordon had established a procedure for calling the command post each morning once the electronic readings on the GC monitor screen showed peaks, indicating the presence of the sample VX in the tubes. This laboratory practice ("challenge") was not written but was taught to all laboratory

technicians and chemists as part of their laboratory training. Once the peaks were apparent on the screen, the individual assigned the GC startup task for the morning was to call the command post and say the GC “has been challenged and was in standby.” The demolition work could not begin for the day until that message was received. There are approximately thirty workmen in the field in standby status awaiting the call from the MCL so that they can begin the day’s work.

28. On August 31, Complainant was assigned the GC startup task. He was in the laboratory with Ms. Gordon, Keith McBrayer, a laboratory technician, and other laboratory technicians. After Complainant had begun the GC process and the VX peak was on the electronic screen, he did not call the command post. Mr. McBrayer saw the peak on the screen, thought that it was appropriate to call the command post, and told Complainant that he should call the command post. When Complainant did not make the call, Ms. Gordon also told Complainant he should call based on the readings on the screen. Complainant refused, saying he wanted to wait for the paper print out to read the calculations. Ms. Gordon told him once again to follow her instructions. This exchange was made in raised voices, but not unprofessionally according to Mr. McBrayer who felt Complainant was concerned because of his lack of experience with the startup of the GC.

29. The next day, Saturday, September 1, was the day for a regularly scheduled site safety meeting. Complainant was once again assigned the same GC startup task. He began the initial steps in the process before the meeting. After the meeting, Ms. Gordon expected that Complainant would go directly to the MCL and complete the startup as he had been instructed. MS. Gordon was delayed in returning to the MCL until about 9:00 a.m. When she entered the laboratory, the GC was idle and she observed that Complainant was labeling a folder. Ms. Gordon put a sample into the GC to complete the task Complainant had been assigned and told him that he should be running the startup process rather than labeling a folder. Complainant took issue with her comments but began preparing the next tube for insertion into the GC when she told him.

30. Once the tube was inserted and the peak was apparent on the screen, Complainant did not call the command post to report the result as he had been instructed to do on the previous day. When Ms. Gordon asked him to call the command post, he told her he wanted to wait for the paper printout. Ms. Gordon pointed out the information was available on the screen and instructed him to make the

radio call to the command post. Complainant continued to resist Ms. Gordon's instructions and said he wanted to wait on the paper printout. Ms. Gordon told him to make the call; Complainant finally made the call, and then asked of Ms. Gordon, "What's your problem?"

31. Ms. Gordon immediately left the MCL to meet with Mr. Ralph Stumpe, the Site Project Manager. She reported to him her frustrations in working with Complainant, saying she could work with him no longer and that either she or Complainant would have to go.

32. Mr. Stumpe paged Dr. Zarate. When Dr. Zarate returned the call, Mr. Stumpe told him, that based on discussions he had earlier in the rotation with Ms. Gordon and an incident she had reported which occurred in the MCL that morning, it appeared that Complainant should not be returned to Newport to work in the MCL for his next rotation.

33. Mr. Stumpe testified that Complainant's desire to wait until the paper printout was available to call the command post was not the accepted procedure and that it was acceptable to call the command post based on the electronic information on the screen. He explained this to Complainant and also discussed Complainant's work assignment related to the SOPs. Mr. Stumpe said he knew that Complainant was having problems completing that assignment based on conversations he had earlier in the week with Dr. Zarate and Ms. Gordon.

34. Dr. Zarate called Mr. Weatherington on September 4 and reported the September 1 incident involving Complainant and Ms. Gordon. Mr. Weatherington had conversations with Dr. Zarate and Ms. Gordon during the previous three weeks about problems with Complainant's performance and behavior on the job. Based on those and the latest report, Mr. Weatherington instructed Dr. Zarate to tell Complainant to bring his personal belongings from Newport with him when he left at the end of his rotation. Dr. Zarate called Complainant in Newport on September 4 to give him Mr. Weatherington's instructions regarding returning to Muscle Shoals.

35. When Complainant returned to Muscle Shoals, he met with Mr. Weatherington on September 10. Mr. Weatherington told Complainant that there were problems with his performance and that things were not working out with his employment. Mr. Weatherington told Complainant that he was leaving for a trip to the

TVA project in Pine Bluff, Arkansas, and would give Complainant a decision when he returned on Friday regarding Complainant's continued employment. Contrary to Complainant's testimony, Mr. Weatherington denied telling Complainant that he might be used on the Pine Bluff project.

36. At this time, Complainant raised workplace safety issues with Mr. Weatherington. Those issues included the need for hooded filters in the Mobile Laboratory; Ms. Gordon's failure to return the command post key to the safe; eye wash stations; coverage of high voltage lines and emission of fumes from a gasoline generator. Mr. Weatherington told him he would address the issues, and Mr. Weatherington called Dr. Zarate to discuss the issues with him. Mr. Weatherington also requested that Dr. William Rogers, Quality Officer for ER&TA, conduct a safety audit to ensure that each of the issues were investigated.

37. On September 14, 2001, Mr. Weatherington met with Complainant and told him that his six-month temporary appointment was being terminated two months early, effective September 21, 2001. Mr. Weatherington told Complainant that his employment was being terminated because of performance problems and because of a change in the organization's business needs since two other chemists were available to perform the work at the Newport site. Mr. Weatherington gave Complainant a termination letter which did not state the reasons for termination.

38. Mr. Weatherington testified he had terminated other temporary employees, either at the end of their six-month appointment or before the end, based on lack of work or performance problems. He said he used the same letter to terminate those employees.

39. During the final week of his employment after being told he was being terminated, Complainant sought information about union representation in filing a grievance over his termination and discussed with Dr. Rogers some concerns he had about workplace safety at the Newport site. Dr. Rogers was the author of the MCL Chemical Hygiene Plan which was written to meet OSHA standards for workplace safety. Dr. Rogers had trained Complainant on this plan.

40. After his termination was effective, Complainant called the Hotline of the TVA Inspector General. Andy Derryberry, Special Agent with the Office of the Inspector General, investigated the complaint as it related to discrimination against

Complainant for raising safety issues. (Tr. 463). Mr. Derryberry visited the Newport site and met with managers, supervisors, and co-workers of Complainant. He testified he found no evidence of attempts to discriminate against employees who raised safety issues, but rather found an emphasis of safety among all employees at the worksite. He also was told Complainant had been argumentative and uncooperative.

41. In mid-October 2001, Complainant contacted the TVA Corporate Safety Office to raise the same workplace safety issues. Tommy Lucas, Program Manager, enlisted a private contractor to investigate the complaint. Both the contractor, James Johnson, and Mr. Lucas, spoke with Complainant by phone to understand the workplace safety issues he was raising. They asked that he prepare a Hazard Identification Report (HIR) to document the issues he was raising and sent him the HIR form to complete and return to them. Complainant never returned the HIR form to them or provided them any documentation in writing regarding the issues he was raising.

42. In December 2001, Mr. Gilbert, OSHA Area Director in Indianapolis, received a copy of a letter sent by Complainant to the Atlanta OSHA office on November 16, 2001.² The letter contained an account of alleged workplace safety issues which Complainant claimed he had observed while working at the Newport site.

43. In a January 9, 2002, letter from Mr. Gilbert to Dr. Zarate, Respondent was notified Complainant was alleging violations of the Act and was claiming that he had been terminated for raising issues related to the Act. This complaint was based on the letters sent to the Atlanta OSHA office and on a December 10, 2001, letter to the Atlanta office enumerating the same eleven issues.

Conclusions of Law

To establish a prima facie case of retaliation under the whistleblower provisions of the Act, a complainant must show that: (1) the complainant was a covered employee; (2) the complainant was engaged in protected activity; (3) the employer was aware of that protected activity; and (4) the employer took some adverse action against the

² Complainant testified under oath and by affidavits he mailed a complaint on October 12, 2001, to Mr. Gilbert which was never received. By Order dated July 23, 2002, I accepted the Complainant's sworn testimony and found his complaint to be timely filed.

complainant because of such activity. The complainant must present evidence sufficient to raise the inference that the protected activity was the likely reason for the adverse action. *Dartey v. Zack Co. of Chicago*, Case No. 82-ERA-2, Sec. Ord., Apt. 25, 1983, slip op. at 8. *Passaic Valley Sewage Com'rs v. Dept. of Labor*, 992 F.2d 474, 480-81 (3rd Cir. 1993); *Carroll v. U. S. Dept. of Labor*, 78 F.3d 352, 356 (8th Cir. 1996); *Kahn v. U. S. Secretary of Labor*, 64 F.3d 271, 278 (7th Cir. 1995). If the complainant makes out a prima facie case, the burden of production shifts to the employer to articulate a legitimate business reason for the adverse action. Where the employer articulates a legitimate nondiscriminatory reason for the adverse action, the complainant must prove by a preponderance of the evidence that the reasons articulated by the employer were pretextual, either by showing that the unlawful reason more than likely motivated the employer or by a showing that the proffered explanation is not credible and that the employer discriminated against him. *Nichols v. Bechel Construction Co.*, 87-ERA-44 (Sec'y October 26, 1992); *Carroll, supra*; *Kahn, supra*.

In this case I find that while Complainant's overall job performance was perhaps less than stellar, he was a covered employee under the Act, he did engage in protected activity of which Respondent was aware and, as a result of which, Complainant was terminated two (2) months prior to the lapse of his six (6) months employment contract. That Complainant suffered any greater loss than two (2) months salary and attorney's fees and costs; however, I do not so find. Specifically, I find no evidence to support an order of reinstatement or award of compensatory damages.

Prima Facie Case

While I am not certain that all of Complainant's safety and security concerns, voiced before and after his termination (wearing lab coats, glasses and gloves, location of command post key, location of electrical wires, location of SOPs, etc.) were concerns covered by this particular environmental act, I find that Complainant's concerns over challenging the gas chromatograph arguably constituted reasonably perceived violations which could implicate the Clean Air Act. Had the accuracy of the machine failed, the workers in the field could have been placed in harms way by undetected vapors.

As stated in the preceding findings of fact, Complainant was hired to work, at least some of the time, in the mobile chemistry laboratory at Newport, Indiana, where

Respondent had a contract to perform demolition work at an Army chemical depot that had once been used for the production of VX, a toxic chemical warfare agent.

The data sheet on the lethal nerve agent known as VX can be found at Respondent's exhibit 21. While not a chemist, I can read from that exhibit that inhalation of VX vapors in excess of a certain dosage can result in death. Fumes are not to be breathed, and in addition to proper ventilation, chemical hoods, gloves and eye protection, "real-time low level monitors are required for VX operations."

Obviously, VX is an agent which has the potential of being a dangerous if not deadly "air pollutant," and having so found, I conclude that Complainant's safety concerns with the proper startup of the gas chromatograph (GC) were objectively reasonable and sufficient to place him under the employee protection provisions of the Act.

There were apparently no written procedures yet in place for the GC. Complainant, a 55 year old PhD chemist with 20 years experience erred, if at all, on the side of redundancy when he demanded a written printout on August 31, 2001, and September 1, 2001, that the GC was properly challenged and up and running before he would release the field workers to begin their daily tasks.

In explaining his actions, Complainant testified that VX can exist as a dangerous vapor and that because of lack of SOPs he felt a written print out was essential to know the status of the instrument since he could not make out the information on the monitor. Ms. Gordon, the supervisor of the laboratory, overrode Claimant, but Keith McBrayer, an environmental technician who was present on at least one of the occasions, understood Complainant's concerns and testified: "He just wanted to see the peak and he was in a training status and I guess he didn't have the experience to see that that was a good valid peak and he wanted to see the number on it." (Tr. 357).

That Complainant reluctantly followed the oral GC procedures established by Ms. Gordon, whose competence Complainant questioned and whose safety concerns Complainant had previously challenged, is not an issue.³ That Ms. Gordon was present

³ Following his first rotation to the Mobile Laboratory, Complainant had complained to Dr. Zarate that use of safety glasses, laboratory coats, safety gloves and the availability of written SOP's were lacking at the laboratory. Dr. Zarate called Ms. Gordon and required her to address

on both August 31 and September 1 when Complainant showed his reluctance to follow her procedure and that she immediately reported to the project manager, Ralph Stumpe, that she could no longer work with Complainant is not an issue. Neither is it an issue that Mr. Stumpe then told Dr. Zarate, Complainant was not to return to the Newport project on his next rotation, nor is it an issue that Mr. Weatherington terminated Complainant on September 14, 2001, effective September 21, 2001.

Therefore, based on the foregoing I find Complainant has made out a prima facie case that he was a covered employee; that he engaged in protected activity; that Respondent was aware of Complainant's activity; that Respondent terminated Complainant and that the protected activity was likely the reason for the termination. Thus, the burden or production shifts to Respondent to articulate legitimate business reasons for the adverse action.

Respondent's Articulated Reasons for Adverse Action

Although not provided as reasons in Complainant's termination letter, Respondent now offers five reasons for prematurely terminating Complainant: (1) Complainant had been hired to provide Saudi Arabia business contacts but failed; (2) Complainant failed to produce acceptable work assignments given him by Dr. Zarate; (3) Complainant was unable to perform work as an analytical chemist in the Mobile Laboratory; (4) Complainant had an argumentative and uncooperative attitude; and (5) after September 11, 2001, two additional chemists became available to perform Complainant's job duties. Whether through direct or circumstantial evidence, I find that Complainant has rebutted these reasons articulated by Respondent as being a pretext for his early termination.

As to the first alleged reason for termination, Complainant's exhibit 2 demonstrates that Saudi Arabia ceased being a concern long before Complainant was employed. Complainant substantiated this fact through his testimony. As to reasons 2, 3, and 4, all of which deal with Complainant's overall job performance, while they were perhaps reasons not to extend Complainant's employment contract beyond its stated period, except for his August 6 argument with Dr. Zarate, these reasons were

these concerns.

never articulated to Complainant either orally or in writing prior to his termination.⁴ Rather Complainant was continuing to work on his assignments of completing SOPs for VX analysis in the laboratory for Army approval as well as a detailed outline for training employees assigned to work in the laboratory. He had continued on rotation his visits to Newport. No written reprimands or reprisals were in Complainant's personnel file. In other words, while problems existed no action was taken against Complainant until after Ms. Gordon told Mr. Stumpe that she or Complainant had to be removed from the Mobile Laboratory; and again, while I accept there were issues with Complainant's job performance and attitude that might well have ended his employment in November, I do not accept that these were the primary reasons for his premature termination in September.

Lastly, by September 10, 2001, Complainant had come back from Newport with the admonition that he would not be allowed to return, and Mr. Weatherington on that date warned Complainant of possible termination. The tragedy of September 11, occurred the next day, and Complainant was terminated on September 14, 2001, effective September 21, 2001. Obviously, Complainant's termination had been set in motion by management before September 11, 2001. That Complainant was suddenly terminated because of the availability of two chemists who returned from other parts of the world following September 11, is, in my opinion, blatantly pretextual.

Based upon the foregoing, I find that Complainant has shown by a preponderance of the evidence that Respondent's stated reasons for his early termination were pretextual, and that more than likely the reason for his early termination was Complainant's reasonable concerns and reluctance with the startup of the gas chromatograph on August 31 and September 1, 2001.

Damages

Respondent's exhibit 1 is Complainant's offer of employment. Unmistakably, it was for a period of six months and one day at an annual salary of \$58,000.00 to end on November 21, 2001. Complainant was wrongly terminated two months earlier on

⁴ Granted, there is testimony that 3 weeks prior to his termination, Mr. Weatherington, Dr. Zarate and Ms. Gordon allegedly discussed Complainant's job performance among themselves; however, it was not until September 10, that Complainant was told by Mr. Weatherington his performance was unsatisfactory.

September 21, 2001, and lost two months salary totaling \$9,606.67, plus interest. I find Complainant is owed this amount from Respondent, plus attorney's fees and costs. Though it appears to be a common practice with the Respondent that employees are temporarily hired and their employment sometimes extended, that is not to say that would have occurred in Complainant's situation. Everyone, except Complainant, who has testified about the issue denied the Complainant had been promised permanent employment. Consequently, I find the terms of the letter of employment speaks for itself, and Complainant's request for reinstatement is denied.

ORDER

It is my finding and recommendation that Complainant should prevail on his complaint and a final order should issue awarding Complainant \$9,606.67 in loss wages, plus interest calculated in accordance with 28 U.S.C. §1961, and that Respondent be ordered to expunge the reason for Complainant's termination from Complainant's personnel records. As to the matter of attorney's fees and costs, counsel for Complainant, within 20 days of receipt of this ORDER, shall submit a fully supported fee application, a copy of which must be sent to opposing counsel who shall then have 10 days to respond with objections thereto. I shall then issue a Supplemental Recommended Decision and Order on the issue of attorney's fees and costs.

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C. RICHARD AVERY
Administrative Law Judge

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